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No. [redacted] 10

In the Supreme Court of the United States

October Term, 1934

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner

vs.

Guy Bard Plumbing Tank Co. (a Texas [illegible] corporation), Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

CITY BANK FARMERS TRUST CO., AS TRUSTEE UNDER an Agreement with Gertrude Feldman James, Deceased

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on December 24, 1934 (R. 58), affirming the decision of the Board of Tax Appeals.

QUESTIONS PRESENTED

1. Whether Section 302 (d) of the Revenue Act of 1926 requires the inclusion in the gross estate of the value of the corpus of a trust created by the

decedent in 1930, where the grantor in conjunction with her husband, who had a life interest therein, and the trustee, had the power to revoke or modify the trust.

2. If so construed, whether Section 302 (d) violates the Fifth Amendment to the Constitution.

3. Whether Section 302 (d) of the Revenue Act of 1926 requires the inclusion in the gross estate of the value of certain contingent remainder interests in a trust created by the decedent in 1930, where the grantor, in conjunction with her husband, who had a life interest therein, and the trustee, had the power to revoke or modify the trust.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of

his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

* * * * *

(U. S. C. App., Title 26, Section 1094.)

STATEMENT

The essential facts were stipulated and were found by the Board as follows:

The decedent, Gertrude Feldman James, died May 20, 1931, a nonresident of the United States (R. 28).

On February 21, 1930, she transferred certain securities to the City Bank Farmers Trust Company in trust for certain purposes during the lives of her two daughters, or the survivor of them (R. 28–29).

The income of the trust was to be paid to her until her death or until the termination of the trust, whichever should first occur (R. 28–29).

In the event that she died prior to the termination of the trust, the income was to be paid to the grantor's husband, Samuel James, so long as he lived or until the termination of the trust. If he died prior to the termination of the trust, the principal was to be divided into as many shares as there were children of the grantor and Samuel James then living, plus one share for the descendants then living of any deceased child. The income of each share was to be applied to the use of such child during his life or until the termination of the trust period, whichever should first occur, and, upon his death prior to the termination of the trust, the principal was to be paid to his descendants in such proportions as he had appointed by will, and any part not so appointed was to be paid to his descendants, if living, in equal parts *per stirpes* and not *per capita*. If no descendants of such child were living at that time, the principal was to be paid in equal parts *per stirpes* and not *per capita* to the surviving children of the settlor and Samuel James and the descendants of any deceased child, or if none were living, to such persons as should then constitute the heirs at law of Samuel James according to the laws of New York then governing the descent of real estate (R. 29–30).

In the case of any child who had predeceased the settlor, the principal of the share set apart for

her descendants was to be paid over to such descendants in equal parts *per stirpes* and not *per capita* (R. 30).[1]

Upon the termination of the trust, the principal was to be paid to Samuel James, if then living; and, if not, to the settlor, if then living; or, if not, to such beneficiaries as were then receiving the income as above outlined and in the same proportions; or, if no such beneficiaries were then living, to the heirs of Samuel James, according to the laws of New York governing the descent of real estate (R. 30).

The trustee was given authority from time to time to apply to the use of the grantor's husband and descendants so much of the principal as it deemed advisable for their proper "education, care, comfort, support or advancement in life", and was to defer delivery of principal to any minor, making payment of necessary amounts to his parent or guardian for his support, but in its discretion the trustee might apply to a minor's use so much of the principal as it might deem advisable (R. 11, 30).

The trust contained spendthrift provisions (R. 11–12) and provisions reserving to the grantor (or her husband after her death) certain powers in directing investments, etc. (R. 13–15).

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[1] Provided, of course, that neither the grantor nor her husband survived the termination of the trust. See next paragraph.

Paragraph 12 provided as follows (R. 15, 31):

> The Settlor shall have the right, at any time, and from time to time during her life, by an instrument or instruments in writing delivered to the Trustee to modify, alter or revoke this agreement in whole or in part, or to change any beneficial interest hereunder, provided however, that no such revocation, alteration or change of beneficial interest shall be effected without the consent in writing of the Trustee and of the said SAMUEL JAMES during his life and, after his death, of the Trustee and of FRANK SAMUEL JAMES, brother of the said SAMUEL JAMES, during his life and in case of disagreement between the Settlor and the CITY BANK FARMERS TRUST COMPANY, then the decision of the said SAMUEL JAMES or FRANK SAMUEL JAMES, as the case may be, shall be final; and the Settlor reserves to herself the right to increase this trust by delivering property or making insurance policies payable to the Trustee for that purpose but the duties and liabilities of the trustee shall not be substantially increased without its written consent.

Samuel James, the husband of the settlor, survived his wife, whose death occurred prior to the termination of the trust, and the provisions of the trust instrument became effective as therein provided upon the happening of that contingency.

The Commissioner determined a deficiency in estate tax of $11,840.03, based upon his inclusion of the value of the corpus of the trust estate in the

decedent's gross estate under Section 302 (d) of the Revenue Act of 1926 (R. 20).

The Board reversed the action of the Commissioner, holding that Section 302 (d) did not apply. The Circuit Court of Appeals, one Judge dissenting, affirmed the decision of the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Commissioner urges that the Circuit Court of Appeals erred:

1. In failing and refusing to find that the enjoyment of said securities was subject to change at the date of the decedent's death, through the exercise of the power, "either by the decedent alone or in conjunction with any person, to alter, amend, or revoke", within the meaning of Section 302 (d) of the Revenue Act of 1926.

2. In failing and refusing to find that the value of certain contingent remainder interests in the trust created by the decedent in 1930 should be included in the gross estate of the decedent, where the grantor, in conjunction with her husband and the trustee, had the power to revoke or modify the trust.

3. In affirming the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The court below construed Section 302 (d) of the Revenue Act of 1926 as applying only to trusts created by a decedent in which was reserved the

power to revoke or amend the trust, either alone or in conjunction with *someone not a beneficiary* of the trust, though the statute plainly reads "alone or in conjunction with *any person.*" In so holding, the court restricted the application of a plain and unambiguous statute, which required no construction (*United States* v. *Mo. Pac. R. Co.,* 278 U. S. 269; *Ruggles* v. *Illinois,* 108 U. S. 526, 534; *Hamilton* v. *Rathbone,* 175 U. S. 414, 419), and amended the provision under pretense of construing it, contrary to the principle laid down by this Court in *Heiner* v. *Donnan,* 285 U. S. 312.

2. The question whether the statute, if construed literally, to include trusts in which the grantor must gain the consent of the beneficiary to revoke the trust, would violate the due process clause in the Constitution, is a question which has not been, but should be, decided by this Court. The decision in *Porter* v. *Commissioner,* 288 U. S. 436, upheld the validity of the provision as applied to trusts in which the grantor had no power to make a change in the trust to benefit himself, but in that case, the power of amendment which he did have could be exercised alone. See also *Cook* v. *Commissioner,* 66 F. (2d) 995 (C. C. A. 3d), certiorari denied, 291 U. S. 660. On October 8, 1934, the Court denied the petition for writ of certiorari in the case of *Witherbee* v. *Commissioner,* No. 220, October term, 1934, in which the Circuit Court of Appeals for the Second Circuit upheld the validity of the provision, where the grantor with the consent of

the trustee could revoke the trust (70 F. (2d) 696), but this Court had already determined that a trustee's interest is not an adverse interest. *Reinecke* v. *Smith*, 289 U. S. 172.

Nor was the question settled by the decision in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. In that case the Court refused to construe a provision of the Revenue Act of 1921 relating to transfers intended to take effect at or after death as applicable to a trust where the grantor, with the consent of one or more beneficiaries, could revoke the trust, for the reason that it felt that such a construction was not compelled by the language employed and would raise doubts concerning the validity of the statute. The 1921 Act contained no provision analogous to Section 302 (d) of the 1926 Act, so that the Court did not pass upon the question here involved. See *Dort* v. *Helvering*, 69 F. (2d) 836 (App. D. C.), certiorari denied, October 8, 1934.

3. The decision below conflicts with the decision of the Circuit Court of Appeals for the Third Circuit in *Lit* v. *Commissioner*, 72 F. (2d) 551, insofar as it holds that the value of the entire trust is to be excluded from the gross estate of the grantor. In the *Lit* case, the court held that the wife's life estate could not be taxed, since she had to consent to revocation and her interest was adverse, but held the son's remainder interest to be taxable. The dissenting opinion in this case is in accord with the *Lit* decision, in holding that the corpus of the trust,

less the value of the husband's interest, should be included in the grantor's gross estate.

4. The provisions of Section 302 (d), which first appeared in the Revenue Act of 1924, were not amended by the Revenue Acts of 1928 and 1932, and (with a minor amendment) appear in the Revenue Act of 1934,[2] so that the questions here involved will continue to arise. Several similar cases are pending in the various Circuit Courts of Appeals, and it is highly desirable to have the questions determined by this Court.

The provision is regarded as an important one in the administration of the Federal estate tax laws, and a decision determining its applicability to cases where the grantor may revoke with the consent of the beneficiary is urgently required, both by the Treasury Department and by taxpayers generally.

Wherefore, it is respectfully submitted that this petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH 1935.

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[2] Revenue Act of 1924, c. 234, 43 Stat. 253, Section 302 (d) (U. S. C., Title 26, Section 1094); Revenue Act of 1934, c. 277, 48 Stat. 680, 752, Section 401.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 27–34) is reported in 29 B. T. A. 1141. The opinion of the Circuit Court of Appeals (R. 51) is reported in 74 F. (2d) 242.

JURISDICTION

The judgment of the Circuit Court of Appeals, affirming the Board of Tax Appeals, was entered December 24; 1934 (R. 58). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED, STATUTE INVOLVED, ETC.

A statement of the questions presented, statute involved, specification of errors to be urged, and a statement of the case will be found in the foregoing petition.

ARGUMENT

Section 302 (d) of the Revenue Act of 1926, *supra*, provides that there shall be included in the decedent's gross estate the value of any property—

> of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date

> of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . .

In this case, the decedent created a trust in 1930, in which she reserved the right to revoke or modify the trust in conjunction with the trustee and her husband, who, under certain contingencies, would receive the income and/or the corpus of the trust. Thus, the case falls within the precise language of the statute which requires merely that the power of revocation or amendment shall be retained by the grantor "in conjunction with any person."

The Board of Tax Appeals and the court below construed the statute as if it read "in conjunction with any person not a beneficiary of the trust." But the statute was clear and unambiguous (see *Witherbee* v. *Commissioner*, 70 F. (2d) 696 (C. C. A. 2d), certiorari denied, October 8, 1934), and there was no room for interpretation. *Ruggles* v. *Illinois*, 108 U. S. 526, 534; *Lake County* v. *Rollins*, 130 U. S. 662; *Price* v. *Forrest*, 173 U. S. 410; *Hamilton* v. *Rathbone*, 175 U. S. 414; *Caminetti* v. *United States*, 242 U. S. 470; *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269. A statute may not be amended under pretense of construing it. *Heiner* v. *Donnan*, 285 U. S. 312.

The statute being clear, there is no justification for a resort to its legislative history; furthermore, the committee reports fail to justify the Board's assumption that it was the intention of Congress

to enact a provision relating to estate taxes identical with Section 219 (g) relating to income taxes. See H. Rep. No. 179, 68th Cong., 1st Sess., p. 28. There are two differences in the two provisions. Section 219 (g) of the Revenue Acts of 1924 and 1926[1] not only requires that in order to tax the income of a trust to the grantor he must exercise whatever power he has in conjunction with any person not a beneficiary, *but it also requires that his power must consist of the right to revest title in himself.* These differences the dissenting opinion in this case pointed to as an indication that Congress meant in Section 302 (d) exactly what it said (R. 56). If, in enacting Section 302 (d), Congress did not mean to require that the grantor should have the power to revest title in himself (*Porter* v. *Commissioner,* 288 U. S. 436) and had a contrary intention in Section 219 (g), it is reasonable to suppose that Congress did not mean to restrict the application of Section 302 (d) to cases where the power to revoke or amend must be exercised in conjunction with someone not a beneficiary of the trust, although Section 219 (g) was so restricted.

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[1] Section 219 (g): "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

It is true that the Board has consistently taken the view which it took in this case.[2] A similar conclusion was reached by the Circuit Court of Appeals for the First Circuit in the case of *White* v. *Erskine*, 47 F. (2d) 1014 (but the reasoning of the court in that case was repudiated by this Court in *Porter* v. *Commissioner, supra*), and in *White* v. *Poor* (C. C. A. 1st), decided January 31, 1935, not officially reported but found in 1935 C. C. H., Volume 3, paragraph 9132. The Court of Appeals for the District of Columbia, in *Helvering* v. *Helmholtz*, decided December 31, 1934, not officially reported but found in Vol. I, Prentice-Hall, 1935, paragraph 678, adopted a similar construction.

In *Lit* v. *Commissioner*, 72 F. (2d) 551, the Circuit Court of Appeals for the Third Circuit, while adopting the reasoning of the Board of Tax Appeals, held that the value of the remainder in that case was subject to Federal estate tax. In this case the court held to the contrary, and, in this respect, is in conflict with *Lit* v. *Commissioner, supra*.* We submit that, as to the remainder interests, the life estate of the settlor's husband was not an adverse beneficial interest, and they should have been included in the settlor's gross estate, even though the

[2] Among other cases, see *Raegner* v. *Commissioner*, 29 B. T. A. 1243; *Stevens* v. *Commissioner*, 29 B. T. A. 641, now pending before the Circuit Court of Appeals for the Third Circuit; *Strauss* v. *Commissioner*, decided December 6, 1933, now pending before the Circuit Court of Appeals for the Seventh Circuit.

words of the statute, "in conjunction with any person", might be construed to mean "in conjunction with any person not a beneficiary of the trust", since, as is pointed out in the dissenting opinion (R. 57)—

> the husband's own interests, disregarding that dependent on the trustee's discretion, are no different from what they would have been had the settlor's power been wholly omitted.

We submit that, as the Circuit Court of Appeals for the Second Circuit held in the case of *Witherbee* v. *Commissioner, supra*, the statute clearly applies, and the only question is its validity.

In the case of *Porter* v. *Commissioner, supra*, this Court sustained the validity of Section 302 (d), as applied to a case in which the grantor alone had the power to modify the trust, though he could make no change which would benefit himself. In that case the Court said (pp. 444–445):

> But the reservation here may not be ignored; for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation

to ascertain the amount of what in Sec. 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition. *United States* v. *Wells*, 283 U. S. 102, 116. There is no doubt as to the power of Congress so to do. *Reinecke* v. *Northern Trust Co.*, *supra*. *Chase National Bank* v. *United States*, *supra*. *Tyler* v. *United States*, *supra*, 502. *Klein* v. *United States*, 283 U. S. 231. *Gwinn* v. *Commissioner*, 287 U. S. 224.

In *Witherbee* v. *Commissioner*, *supra*, the validity of the statute was sustained as applied to a case in which the grantor could revoke with the consent of one or more trustees, but the court there relied upon the decision of this Court in *Reinecke* v. *Smith*, 289 U. S. 172, holding that a trustee's interest is not adverse.

We believe that justification for the tax in a case where the consent of a beneficiary must be obtained for modification or revocation of the trust may be found in the principles which were applied by the Court in *Burnet* v. *Wells*, 289 U. S. 670. In that case the Court sustained an income tax imposed upon the grantor of an irrevocable trust, with respect to income from the trust used to pay premiums on insurance policies on his life. The Court there held that the possibility of evasion of taxes through the creation of trusts, in which the solidarity of the family was a factor, justified allowing a margin for the play of legislative judgment.

In trusts of the kind here involved, the grantor makes provision for members of his family, and places the power of revocation or amendment in himself and one or more of the members of the family who are beneficiaries. It is fairly obvious that this power is not created with the thought that it can never be exercised. Upon the death of the grantor, there ceases to be the possibility of a change in any beneficiary, and the gifts are for the first time complete. The transfer may reasonably be regarded as a substitute for a testamentary disposition. See *Porter* v. *Commissioner, supra.*

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, the Court referred to a similar transfer as being complete when made. In that case, however, the Court was passing upon the applicability of a provision relating to transfers intended to take effect at or after death, similar to Section 302 (c) of the 1926 Act.[3] The case arose under the Revenue Acts (1918 and 1921) prior to the 1924 Act, in

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[3] Revenue Act of 1926, c. 27, 44 Stat. 9:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

which first appeared Section 302 (d), which is identical with Section 302 (d) of the Revenue Act of 1926, here involved. This Court, in *Porter* v. *Commissioner, supra,* in construing and applying Section 302 (d) of the Revenue Act of 1926, distinguished the *Northern Trust Co.* case, and held it "not in point." This decision also overruled the decision in *White* v. *Erskine,* 47 F. (2d) 1014. The Court in *Reinecke* v. *Northern Trust Co., supra,* was not construing any provision analogous to Section 302 (d), and the Court did not pass upon the question here involved. As was pointed out in the dissenting opinion in this case, that case differed in that "there were no such powers and no such statute" (R. 57). Hence, the issue here involved was not decided in that case. See *Dort* v. *Helvering,* 69 F. (2d) 836 (App. D. C.), certiorari denied, October 8, 1934.

In this case the statute is not being applied retroactively, and the doctrine of *Nichols* v. *Coolidge,* 274 U. S. 531, does not apply. The trusts in this case were created in 1930, four years after the enactment of the applicable provision, so that it must be assumed that the grantor created the trust with full knowledge of the consequences of her act upon her Federal estate tax.

We submit that it cannot be said that Congress has done a wholly arbitrary thing in requiring the inclusion in the gross estate of the full value of the corpus of the trust, even when the power of

revocation had to be exercised by the grantor in conjunction with one having a life interest. The question of due process must be viewed broadly (*Burnet* v. *Wells, supra*), and we think that the line has not been crossed in this case.

CONCLUSION

The court below erred in reading a qualification into the clear and unambiguous provisions of Section 302 (d). The questions of the construction of this provision, as applied to cases in which the grantor must exercise the power of revocation in conjunction with a beneficiary, and the validity of the statute when so construed, have arisen in a number of cases, and will arise under all of the Revenue Acts since the enactment of the Revenue Act of 1924. We respectfully submit that this petition should be granted.

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